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No. 06-619

IN THE

Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
LT. COL. TIMOTHY S. O'ROURKE, DISTRICT ENGINEER,
SAN FRANCISCO DISTRICT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In their opposition brief to the petition for a writ of certiorari, respondents submit four main arguments:

> (1) because the Court of Appeals for the Ninth Circuit deferred ruling on the petition for rehearing filed by petitioner Baccarat Fremont Developers, LLC (Baccarat) pending this Court's resolution of *Rapanos*,[1] it is self-evident that the Ninth Circuit considered this Court's

[1] As styled in the petition, this Court's resolution of the consolidated cases of *United States v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*, 126 S.Ct. 2208 (2006) is referred to herein as "*Rapanos*."

reasoning in *Rapanos* when it denied the rehearing petition (Opp. at 10, 17);

(2) the ACFCD flood control channels, by virtue of being tidally-influenced, are "navigable-in-fact" waters for purposes of finding the subject wetlands to be jurisdictional under the Clean Water Act (CWA) (Opp. at 3, 14-16);

(3) applying the rationale of *Marks v. United States,* 430 U.S. 188 (1977), CWA jurisdiction is established under *Rapanos* if either the plurality's "continuous surface connection" or Justice Kennedy's "significant nexus" test is met (Opp. at 11-14); and

(4) the Ninth Circuit's cursory recital of the Corps' adjacency "findings" constitutes sufficient judicial review as to whether a significant nexus was established in this particular case (Opp. at 16).

Baccarat replies to each of these arguments in turn.

ARGUMENT

1. The Ninth Circuit's summary denial of Baccarat's petition for rehearing cannot be read to imply that the Ninth Circuit considered the merits of the petition in light of *Rapanos*. In its petition for certiorari, Baccarat cited *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) for the Ninth Circuit rule that a summary denial of a petition for rehearing does not imply any judgment on the merits. Pet. at 5, fn. 2. Respondents do not address this authority, and instead suggest, without citing any authority of their own, that one should infer that the Ninth Circuit fully considered and applied the factors set forth in the plurality opinion and Justice Kennedy's concurring opinion. Opp. at 10, 17. Respondents' inference is not warranted. Remand is therefore necessary to require the Court of Appeals to apply the *Rapanos* decision to the facts of this case.

2. In their opposition brief, respondents create a new argument that was not presented nor considered in the courts below. Respondents now argue that Justice Kennedy's exception to the significant nexus test for wetlands adjacent to navigable-in-fact waters should be applied to the wetlands at issue in this case. Opp. at 14-16. This argument is factually and legally incorrect.

It is not disputed that Justice Kennedy's exception to the significant nexus test requires an adjacent navigable-in-fact waterbody: "As applied to wetlands adjacent to navigable-in-fact waters, . . . the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*." 126 S.Ct. at 2248. *Riverside Bayview*[2] "reserved the question of the Corps' authority over 'wetlands that are not adjacent to bodies of open water,' [citation] and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters. . . ." 126 S.Ct. at 2248. On these facts, Justice Kennedy determined that the *Riverside Bayview* decision compels an exception to the significant nexus test. As applied to this case, however, this exception does not even remotely qualify, notwithstanding claims by respondents to the contrary. Opp. at 15.

First, the Baccarat wetlands do not "directly abut" the ACFCD flood control channels. They are at least 65-70 feet removed from the channels, and are separated by man-made berms which prevent any form of hydrological connection between the two waterbodies.[3] Pet. App. at 3a. Unlike the

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[2] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[3] Respondents' claim that two culverts connect the wetlands hydrologically to the western ACFCD channel is absolutely incorrect. Opp. at 6. Even if the wetlands "would have been hydrologically connected" as surmised by the Corps (Pet. App. at 44a), as found by the Corps' San Francisco District and as recounted by the Ninth Circuit, there is *no* hydrological connection due to the intervening berms. Pet. App. at 3a.

facts of *Riverside Bayview*, it is not possible to wade or swim from the Baccarat wetlands to the flood control channels.[4]

Second, it has never been claimed, nor can it be on the facts of this case, that these flood control channels are "open bodies of water" or "navigable-in-fact." The channels are man-made structures operated by the County of Alameda and are designed to carry periodic urban floodwaters to the San Francisco Bay. Pet. App. at 16a.

Third, and going to the core of what respondents appear to be arguing, these nonnavigable flood control channels do not, by virtue of being tidally-influenced, assume "navigable-in-fact" attributes for purposes of applying Justice Kennedy's exception to the significant nexus test. Even though the waters in the ACFCD channels are subject to the ebb and flow of the tide and may therefore qualify as "waters of the United States" under the legal authority cited by respondents (Opp. at 14), this does not mean that they qualify as "navigable-in-fact" waters. Yet, endowing *all* waters subject to the ebb and flow of the tide with navigable-in-fact status is precisely what respondents are attempting.

Although all tidal waters are subject to the ebb and flow of the tide, *not all tidal waters are navigable-in-fact.* In discussing navigable-in-fact waters, both Justice Kennedy and the plurality opinion referenced *The Daniel Ball*, 77 U.S. 557 (1871), which found that navigable waters "are navigable-in-fact when they are used, or are susceptible of

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[4] As described in the government's briefing to the *Riverside Bayview* Court, "there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. . . . Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes." *See* Edgar B. Washburn, *Current Status of the 404 Regulatory Program*, ALI Wetlands L. & Reg. (May/June 2001) (quoting Reply Brief for the United States at 2 (*Riverside Bayview Homes*)).

being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* at 563. This definition from *The Daniel Ball* has expanded over the years to include waters that are now, that have been in the past,[5] or that are susceptible to use with reasonable improvements[6] by vessels in interstate or foreign commerce. The linchpin in this definition is use of the waters to transport commerce.

In contrast, waters subject to the ebb and flow of the tide necessarily embrace a larger geographic area, because commerce cannot follow everywhere the tide flows. This Court has recognized the factual distinction between navigable-in-fact waters and tidally-influenced waters. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (finding that the State took title under the public trust doctrine to submerged lands that were tidally influenced, even though not navigable-in-fact); *see also, 1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1394 (E.D.Va. 1983) ("man-made borrow pit which was not in fact navigable and at low tide is largely empty" does not qualify as "navigable waters of the United States" under the Rivers and Harbors Act of 1899).

Despite this distinction between tidal waters and navigable-in-fact waters, respondents attempt to blend the two by generically asserting that like "any other navigable-in-fact waterbody, tidal waters may contain shallow portions near the edges on which navigation is infeasible. These portions nevertheless remain part of, and are not legally distinct from, the larger navigable-in-fact waterbody." Opp. at 15, n. 6. This generic assertion does not apply to this case. The

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[5] *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-124 (1921).

[6] *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-409 (1940).

ACFCD flood control channels are not "shallow portions near the edges" of the San Francisco Bay; they are man-made channels designed to convey freshwater storm surges from inland populated areas to the Bay for discharge.

In the end, the issue here is *not* whether the waters in the ACFCD flood control channels are jurisdictional under the CWA. For the purposes of this argument, Baccarat assumes that they are. The question is whether these channels are navigable-in-fact so as to allow application of Justice Kennedy's exception to his "significant nexus" test. In that regard, they are not. To label the flood control channels as navigable-in-fact would not only contradict this Court's application of *The Daniel Ball* definition of "navigable-in-fact" waters, it would create an inequitable and arbitrary result in which similarly-situated wetlands would be treated differently under the law, depending on whether they were near a freshwater flood control channel or a tidally-influenced flood control channel. Assuming that both channels qualify as "tributaries" and are "non-navigable," then both, under Justice Kennedy's test, should require a case-by-case analysis of whether a significant nexus exists between the wetlands and the navigable-in-fact waters to which the flood control channels ultimately connect. Applying this standard from *Rapanos* to the facts of this case, a site-specific significant nexus analysis is required.

3. The petition demonstrates that the Ninth Circuit's opinion directly contradicts both the plurality's "continuous surface connection" and Justice Kennedy's "significant nexus" tests. Pet. at 13-21. Instead, the Ninth Circuit expressly rejected any tests based on either a hydrological connection or a "significant nexus." Pet. App. at 10a-13a. Thus, even if respondents' application of the *Marks* rule to the *Rapanos* decision is correct, Baccarat has established that neither test was applied by the Court of Appeals.

4. The Ninth Circuit's perfunctory reference to the Corps' purported adjacency "findings" (Pet. App. at 13a) was fully addressed in the petition (Pet. at 15-21), and will not be replicated here. Like the Ninth Circuit, respondents devote less than a page to this superficial analysis. Opp. at 16; Pet. App. at 13a.

CONCLUSION

For the reasons set forth in Baccarat's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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